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THE COURTS AND THE RULEMAKING PROCESS: THE LIMITS OF JUDICIAL REVIEW

J. Skelly Wright†

> [T]hat the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded.
>
> Lord Shaw in
> Local Government Board v. Arlidge
> [1915] A.C. 120, 138.

Administrative law has entered an age of rulemaking. Administrators who once acted on whim and instinct have been judicially constrained to promulgate and adhere to consistent guidelines.[1] Agencies which once generated policy in a piecemeal fashion through adjudication are now adopting prospective standards of action valid in a number of different settings and against a wide variety of "parties."[2] And the new agencies established by Congress to deal with contemporary environmental, economic, and energy problems have relied heavily on the promulgation of general regulations.[3] These are healthy and welcome developments.

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[1] *See, e.g.*, United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).

[2] For instance, the Federal Power Commission (FPC), overwhelmed by the task of setting rates in case-by-case adjudications, has begun to establish area-wide rates. *See, e.g.*, Permian Basin Area Rate Cases, 390 U.S. 747 (1968). The FPC has also started to establish maximum rate rules covering a number of parties. *See, e.g.*, Mobil Oil Corp. v. FPC, 469 F.2d 130 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 931 (1973). The Federal Trade Commission (FTC), in a major change of position, may also be ready to exercise some rulemaking powers. *See* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

[3] For example, the Environmental Protection Agency (EPA), in partnership with state governments, is authorized to establish air quality standards governing many major indus-

Arguably, some areas of the economy should be deregulated to give fuller play to competitive market forces;[4] and one may doubt that Congress is always wise to delegate to the executive branch and to administrative agencies the responsibility for making fundamental decisions about the economy and the environment.[5] But when Congress *has* adopted a regulatory solution, and when the Delegation Doctrine does not bar that solution, the case for making administrative policy through rules, rather than adjudicatory decisions, is overwhelming.

Trial-like adjudication is extremely costly in time, staff, and money. Before an adjudicatory common law can acquire coherence, conditions typically will have overtaken it. As a consequence, industries subject to adjudicatory regulation are left in a state of perpetual uncertainty, and agencies assume the dangerous power to create new law affecting parties selected at random, or in a discriminatory manner. Orderly innovation is difficult, and emergencies often go unmet. To discern basic agency policy, the public must wade through volumes of scarcely relevant testimony and findings. The technicalities of adjudication allow lawyers to minimize the input of experts and to frustrate agency consideration of relevant scientific and economic perspectives. Regulation becomes an advocate's game. Especially in the rapidly expanding realms of economic, environmental, and energy regulation, the policy disputes are too sharp, the technological considerations too complex, the interests affected too numerous, and the missions too urgent for agencies to rely on the ponderous workings of adjudication.

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tries and most areas of the United States. Clean Air Act of 1970, 42 U.S.C. §§ 1857c-3 to -7 (1970). The four "phases" of the current round of wage-price control have involved rulemaking of an even more farreaching character. The extent to which "legislative" power has been delegated to the Executive to allow him to manage the economy may be gleaned from the language of the seminal Economic Stabilization Act of 1970:

> The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to
>
> (1) stabilize prices, rents, wages, and salaries . . .
>
> (2) stabilize interest rates and corporate dividends and similar transfers at levels consistent with orderly economic growth . . . .

Act of Dec. 22, 1971, Pub. L. No. 92-210, §§ 203(a)(1), (2), 85 Stat. 744, *amending* 12 U.S.C. § 1904 (1970). *See also* S. 2176, 93d Cong., 1st Sess. (1973).

[4] For a lively debate on this issue, see Green & Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871 (1973); Winter, *Economic Regulation vs. Competition: Ralph Nader and Creeping Capitalism*, *id.* at 890; Green & Moore, *Winter's Discontent: Market Failure and Consumer Welfare*, *id.* at 903.

[5] Elsewhere, this author has expressed uneasiness at the demise of the Delegation Doctrine as a tool for judicial review of administrative action. Wright, Book Review, 81 YALE L.J. 575, 582-87 (1972).

These observations are not novel,[6] and judges have not failed to recognize them. A Supreme Court majority recently suggested that agencies may not use an adjudicatory forum to announce new legal standards which will have only prospective effect.[7] A quarter century ago, the Court advised the agencies that "[t]he function of filling in the interstices of [an act] should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."[8] Judge Friendly has persuaded the Second Circuit to take the next logical step, requiring that the National Labor Relations Board promulgate standards of general application only by means of proper rulemaking procedures.[9] The converse claim—that regulated parties have some "right" to an adjudicatory promulgation of general policies merely because these policies affect important interests or preexisting licenses—has been decisively rejected.[10] And when agencies have asserted long dormant rulemaking powers, the courts have been quick to sustain the change of heart.[11]

[6] There is abundant literature criticizing the administrative agencies for excessive reliance on adjudicatory procedures. *See, e.g.*, R. FELLMETH, THE INTERSTATE COMMERCE OMISSION 11-12 (1970); PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 5, 21, 59 (1971) ("ASH COUNCIL" REPORT); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961). *See also* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.06 (1958). For a comprehensive analysis of the relative merits of rules and adjudicatory orders in the making of general policy, see Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965). Professor Davis has forcefully argued that arbitrary administrative action can be effectively curbed only by requiring agencies to formalize their policies in clear rules of prospective application. *See generally* K. DAVIS, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY (1969). Absent promulgation of rules, administrative adjudications are often chaotic and unfair, for neither the parties nor the administrators have any clear notion of what legal standards are being applied. *See generally* Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 1055, 1263 (1962).

[7] NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Splitting seven-two on the outcome, the Court in *Wyman-Gordon* upheld an NLRB order which the Board purported to base on a "rule" adopted at tbe close of an earlier adjudication and not applied to the parties to that adjudication. But only three justices thought tbat this "rule" had any legal force. *Id.* at 769-75. The four remaining justices in the majority agreed with the minority that the rule was invalid, but concluded that the NLRB had other legal authority to issue the order in question. *Id.* at 765-66.

[8] SEC v. Chenery Corp., 332 U.S. 194, 202 (1947).

[9] Bell Aerospace Co. v. NLRB, 475 F.2d 485, 495-97 (2d Cir. 1973).

[10] *See, e.g.*, FPC v. Texaco, Inc., 377 U.S. 33 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966); Air Line Pilots Ass'n Int'l v. Quesada, 276 F.2d 892 (2d Cir. 1960).

[11] *See, e.g.*, Permian Basin Area Rates Cases, 390 U.S. 747 (1968); National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

But a general background of judicial applause is not enough. In rulemaking, no less than in adjudication, Congress has fastened the courts and agencies into an intimate partnership,[12] the success of which requires a precarious balance between judicial deference and self-assertion. In passing on administrative adjudications, the courts over the years have learned to maintain that balance, but judicial review of rulemaking is presenting a new and troublesome question. Some courts have recently shown an inclination to force rulemakers to adopt trial-like procedures—formal hearings, interrogatories, oral argument, cross-examination, and the like—which clearly are not required by the Administrative Procedure Act (APA).[13] Should this tendency become general, rulemaking will lose most of its peculiar advantages as a tool of administrative policymaking, and the merits of the many rulemaking experiments now under way will be denied a fair opportunity to be tested. The trend in agencies toward over-proceduralization arose largely because reviewing courts were hostile to regulation and were uncritically fond of adjudicatory methods for resolving social controversies.[14] From the general paralysis of administration which resulted, the agencies are only now emerging. Before throwing history into reverse, we in the judiciary should at least pause for thought.

[12] *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[13] 5 U.S.C. §§ 551-706 (1970).

[14] No doubt American regulators adopted trial-like procedures for many reasons. Our government is peculiarly lawyer-ridden at all levels, and "judicial" habits of thought and practice thus often dominate other possible perspectives. *See generally* Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966). That the first chairman of the ICC was a judge no doubt helped Congress and the public to view agencies as quasi-courts. *See* M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 29 (1955); R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 65 (1941). But judicial review of agency actions has also played a part. When the courts claimed that ratemaking was "eminently a question for judicial investigation" (Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418, 458 (1890)), and insisted on weighing de novo the evidence supporting agency actions, administrators naturally felt called upon to mimic courtroom procedures and to provide regulated industries the full inventory of "adversary" rights. *See* R. CUSHMAN, *supra* at 66. Early judicial attempts to impose adjudicatory procedures on the agencies were motivated by a generally conservative social philosophy. A contemporary observer protested that "the attempt to read the procedural predilections of judges into the due process clause is as much to be condemned as the similar attempt to read economic predilections into the same constitutional provision." Feller, *Administrative Procedure and the Public Interest—The Results of Due Process*, 25 WASH. U.L.Q. 308, 315 (1940). Chief Justice Stone noted that the legal

> profession of our day, like its predecessors who saw in the pretensions of the chancellor but a new danger to the common law, has given little evidence that it sees in this new method of administrative control any opportunity except for resistance to a strange and therefore unwelcome innovation.

Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 17 (1936).

I

"FAIRNESS" IN RULEMAKING AND THE APA'S PROCEDURES

While procedures for rulemaking, like those for adjudication, should no doubt promote "fairness," that slippery term has very different meanings in the two contexts. An adjudication applies a preexisting legal standard to a small set of controverted facts to determine whether a particular individual should receive a benefit or a penalty. An adjudication is fair to the individual only if the facts are accurately found, and Anglo-American jurisprudence assumes that accuracy is best served by traditional adversary procedures. But it makes no sense to speak of a rule as being fair or unfair to an individual in this objective sense of accuracy. A rule allocates benefits and penalties among large classes of individuals according to a specific normative standard, and the fairness of such an allocation is ultimately a political or philosophical question.[15] Thus, in the rulemaking context, fairness is not identified with accuracy, and procedures designed to maximize accuracy at the cost of all other values are simply inappropriate.

Nor can adjudicatory procedures be justified on the theory that fairness affords parties some basic right to participate in the formulation of rules which may affect them. Administrative agencies derive their sovereignty from Congress, not from the consent of parties potentially affected by agency rules. Moreover, trial-like procedures are a thoroughly illogical vehicle for democratically weighting the views of the interested parties. Such weighting would require instead the election of administrative policy makers or the establishment of some formal system by which interest groups might be represented in the agencies' higher councils.

But there is one sense in which the notion of "fairness" may be applied to administrative rulemaking. Put simply, the *public* is treated unfairly when a rulemaker hides his crucial decisions, or his reasons for them, or when he fails to give good faith attention to all the information and contending views relevant to the issues before him. To this notion of fairness—that rulemaking must be openly informed, reasoned, and candid—there is a two-fold logic. First, if administrators rule in obscurity, Congress cannot intelligently de-

[15] Although a rulemaker may make use of empirical conclusions, these are so dependent on predictions, and on inherently uncertain estimates, that objective terms such as "accurate" and "inaccurate" will typically have little application. Further, because a rulemaker must make and coordinate many empirical and normative judgments, the ultimate shape of the rule seldom "follows from the facts."

legate power or police the exercise of power already delegated. Second, although the "public interest" cannot be objectively defined, one can safely conclude that administrators who ignore relevant facts and who take the counsel of blind prejudice will serve the "public interest" only by the operation of chance. Therefore, although a rulemaker's decisions cannot be "accurate" in the conventional sense, and although regnlated parties have no fundamental "right" to participate in rulemaking, the administrator owes a duty to the public to give serious consideration to all reasonable contentions and evidence pertinent to the rules he is considering.

The APA provides rulemaking procedures which directly enforce this duty. The procedures are uncluttered by inappropriate references to the ways of the courtroom or the world of electoral politics. Section 553 imposes a three-fold obligation on a rulemaker. First, the rulemaker must give public notice of "the legal authority under which the rule is proposed" and of "either the terms of substance of the proposed rule or a description of the subjects and issues involved," at least thirty days before its effective date. Second, he must "give interested persons an opportunity to participate in the ruling making through submission of written data, views, or arguments with or without opportunity for oral presentation." Finally, "[a]fter consideration of the relevant matter presented," the rulemaker must "incorporate in the rules adopted a concise and general statement of their basis and purpose."[16]

If accorded a properly expansive reading, section 553 provides a fully adequate scope for judicial review of rulemaking. Certainly, the courts have not felt cramped by the section's brevity. Recent cases, for instance, have put useful teeth into the step one notice provision. If an agency's empirical predictions constitute a substantial basis for its rule, the methodology of prediction should be made public so that interested parties have an opportunity to study and criticize it.[17] If a flat rate is to be set for allocating costs between two industry services, the agency should specifically inform the public of this result and not merely report that *some* method of allocation is contemplated.[18] If an agency wishes to base its rulings on facts developed in a corollary adjudication, the agency must say so, and interested parties must be allowed to contest the relevance of the adjudicatory record to the contem-

[16] 5 U.S.C. § 553 (1970).

[17] *See* Portland Cement Ass'n v. Ruckelshaus, No. 72-1073 (D.C. Cir., June 29, 1973) 31-37; *cf.* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973).

[18] *See* Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1251 n.39 (D.C. Cir. 1973).

plated rulings.[19] It is the common spirit of such decisions that the agency must make continuous disclosure of the facts and assumptions on which it intends to rely in promulgating its rule. Obviously, this philosophy of candor must also characterize the "basis and purpose" statement issued by the agency in step three. It cannot be so "concise" and "general" that the court is faced with merely conclusory assertions; the agency must show that it truly has given serious consideration to possible alternative rulings.[20] Although detailed findings of fact are unnecessary, the reviewing court may demand reasoned explanations for controversial normative and empirical determinations made by the agency.[21] At a minimum, the statement should refer to relevant submissions by interested parties and should rebut or accept these submissions in an orderly fashion.[22]

Section 553 contemplates that rules will be made through a genuine dialogue between agency experts and concerned members of the public. In policing the three-step procedure, the reviewing court must satisfy itself that the requisite dialogue occurred and that it was not a sham.

II

THE AD HOC APPROACH TO PROCEDURAL REVIEW OF RULEMAKING

There is an important difference between interpreting section 553 creatively and simply disregarding it. That section mandates a dialogue, not a trial. Nothing in section 553 says that a rulemaker must give individual answers to critical interrogatories, provide oral hearings, allow cross-examination of experts, or develop a testimo-

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[19] *See* Texas Gulf Coast Area Natural Gas Rate Cases, No. 71-1828 (D.C. Cir., Aug. 24, 1973) 51-52; Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1251 n.39 (D.C. Cir. 1973). Compare Chicago v. FPC, 458 F.2d 731, 746 (D.C. Cir.), *cert. denied*, 405 U.S. 1074 (1972).

[20] Pillai v. CAB, No. 73-1408 (D.C. Cir., Aug. 22, 1973) 18-24.

[21] *See* National Air Carrier Ass'n v. CAB, 436 F.2d 185, 198-99 (D.C. Cir. 1970); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968). In Kennecott Copper Corp. v. EPA, 462 F.2d 846, 849-50 (D.C. Cir. 1972), the court, in an opinion which this author joined, reached similar results, but suggested that it was requiring more than the APA minimally demanded. This caveat may have been unnecessary. Both the notice and the "basis and purpose" requirements of § 553 are obviously very flexible, and should be adapted to the particular rules and issues in the case. Such flexibility may also be appropriately exercised to reflect intensified standards of substantive review contained in particular agency statutes. *See* note 34 and accompanying text *infra*.

[22] Portland Cement Ass'n v. Ruckelshaus, No. 72-1073 (D.C. Cir., June 29, 1973) 35. Obviously, the agency's duty to rationalize its decisions is not met by post hoc rationalizations offered for the first time by counsel during judicial review of those actions. Burlington Truck Lines v. United States, 371 U.S. 156, 167-69 (1962).

nial record. Section 553 does not prevent agencies from adopting such procedures if they wish to do so, and in establishing a new rulemaking authority or agency, Congress may, of course, carve out exceptions to section 553 or impose procedures beyond those listed there. Indeed, the APA itself permits Congress to invoke the full panoply of adjudicatory procedures, set out in sections 556 and 557, simply by stating that rulemaking by a particular agency must be preceded by a "hearing on the record."[23] But if Congress remains silent, the APA clearly contemplates that reviewing courts will insist on neither more nor less than section 553 requires.

Some recent lower court decisions, however, have urged upon rulemaking agencies a variety of procedures not found either in section 553 or in the particular agency statutes under review. Consider *International Harvester Co. v. Ruckelshaus*,[24] an exceptionally thoughtful decision rendered last term by a panel of our court. There the Environmental Protection Agency (EPA) had decided not to suspend for one year the Clean Air Act's 1975 standards for auto emission control. The Act permitted a suspension only if the EPA Administrator determined that the technology necessary to meet the 1975 standards was not "available."[25] Because the Administrator had determined the availability of such technology by means of a complex "prediction methodology" never revealed to the auto companies, the court remanded the case to the EPA to give "the parties . . . [an] opportunity . . . to address themselves to matters not previously put before them."[26] Arguably, this conclusion followed directly from the notice requirement in section 553 of the APA, for the methodology itself was an important "issue" which the Agency should have publicized for comment and criticism before announcing its final decision.

The court went further, however, stating that

> [i]n the remand proceeding . . . we require reasonable cross-examination as to new lines of testimony, and as to submissions previously made to EPA in the hearing on a proffer that critical questions could not be satisfactorily pursued by procedures previously in effect.[27]

It is true that the opinion permits the EPA to "confine cross-examination to the essentials, avoiding discursive or repetitive

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[23] 5 U.S.C. § 553(c) (1970); *see id.* §§ 556, 557.

[24] 478 F.2d 615 (D.C. Cir. 1973).

[25] 42 U.S.C. § 1857f-1(b)(5)(D)(iii) (1970).

[26] 478 F.2d at 649.

[27] *Id.*

questioning."[28] But the fact remains that neither section 553 nor the Clean Air Act requires *any* cross-examination procedure for rulemaking. The court rested its order simply on "the interest of providing a reasoned decision."[29]

Similarly, in *Mobil Oil Corp. v. FPC*,[30] the court questioned a Federal Power Commission rule under the Natural Gas Act[31] which established flat-rate cost figures for transporting various fuels by pipeline. While acknowledging that the Natural Gas Act did not require a "hearing on the record" and that the adjudicatory procedures of sections 556 and 557 of the APA were not required, the court nevertheless held that the FPC could not "proceed with only the guidance of the . . . standards of section 553."[32] The court reasoned that "artificial distinctions based upon the language of the APA should be avoided in determining what procedure should be followed."[33] The APA's language was disregarded here because the Natural Gas Act requires "substantial evidence" as support for agency actions.[34] The court did not dictate any particular proce-

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[28] *Id.* The majority held that these procedures were required on remand in the case, but did not hold that the EPA had erred in neglecting to use them in its initial disposition of the case. In his concurring opinion, Judge Bazelon labelled this approach a "bit of judicial legerdemain"; he would have held such procedures necessary in the agency's original action. *Id.* at 652.

[29] *Id.* at 649.

[30] 483 F.2d 1238 (D.C. Cir. 1973).

[31] 15 U.S.C. §§ 717(c), (d) (1970).

[32] 483 F.2d at 1251.

[33] *Id.* at 1252.

[34] *Id.* at 1257-58. Ignoring the APA in this manner reads too much into the term "substantial evidence." Although the term obviously has its roots in the history of adjudicatory proceedings, it literally establishes a standard of substantive review, not a procedural requisite. There is no logical impediment to associating this standard of review with the rulemaking procedures of § 553. *See* Texas Gulf Coast Area Natural Gas Rate Cases, No. 71-1828 (D.C. Cir., Aug. 24, 1973) 49-50 & n.59; Phillips Petroleum v. FPC, 475 F.2d 842 (10th Cir. 1973); *cf.* Chicago v. FPC, 458 F.2d 731, 744-45 & n.62 (D.C. Cir.), *cert. denied*, 405 U.S. 1074 (1972). Rulemaking procedures generate an "administrative record," which may be searched for substantial evidence to support the rule decided on. *See* text accompanying notes 90-92 *infra*. This is not to say that the standard of review is wholly unrelated to "procedural" questions. If a particular rule rests on an extensive analysis of data or on a complex prediction—which may well be the case with rules subjected to the "substantial evidence" test by Congress—courts should require the agency to operate the three-step procedure of § 553 in a manner sensitive to the empirical complexities at stake. The step-one notice should, for instance, include all the important details of the factfinding methods and research sources which the agency intends to utilize. And the step-three "basis and purpose" statement should make detailed reference to all the factual disputes raised by the submissions of interested parties. Most important, the agency should not rely on any research methods or data which were not presented to the interested parties for comment and criticism. *See* Texas Gulf Coast Area Natural Gas Rate Cases, *supra* at 50. The rulemaking process established by § 553 is not inflexible; it can vary with the issues involved. The mere

dures for use on remand, concluding only that "some sort of adversary, adjudicative-type procedures" would be necessary.[35] Cross-examination and written interrogatories were suggested "by way of illustration."[36]

Although *International Harvester* and *Mobil Oil* depart from the APA with diffidence, dicta in other cases do so rather bluntly. We are told that the APA's distinctions between informal rulemaking procedures[37] and full adjudicatory procedures[38] have been "discarded . . . as criteria for determining the type of hearing to which the parties affected by administrative action are entitled."[39] Courts are to devise mandatory procedures according to the "kind" or "importance" of the issues in the proceeding.[40] Hearings, for instance, are deemed necessary whenever "a genuine and substantial issue of fact" has been raised by means of an offer of proof,[41] or at least when "the issue presented is one which possesses great substantive importance, or one which is unusually complex or difficult to resolve on the basis of pleadings and argument."[42] The underlying theory of these cases has been accurately conveyed by Professor Claggett:

> In *any* case where a rulemaking proceeding involves a contested issue of fact which has a vital bearing on the reasonableness of the rule and which is readily susceptible to taking of evidence, an agency may well abuse its discretion if it fails to conduct an evidentiary hearing even in an area where no statutory right to an adjudication is involved.[43]

Thus, after an agency has fully completed its consideration and promulgation of a rule, the reviewing court may demand reconsideration under any procedures which, in retrospect, strike the court as being appropriate to the issues raised. This curious "ad hoc" approach to procedural review is not authorized by the APA or by any other statute; nor should it become the law by judicial fiat.

presence of factual questions in a rulemaking or of a "substantial evidence" standard of review is thus no reason to substitute formal, adjudicatory procedures for the expeditious routine of agency notice-comment by parties-agency decision.

[35] 483 F.2d at 1259.

[36] *Id.* at 1262-63 & n.91.

[37] 5 U.S.C. § 553 (1970).

[38] *Id.* §§ 556, 557.

[39] Appalachian Power Co. v. EPA, 477 F.2d 495, 500 (4th Cir. 1973) (dictum).

[40] *See* Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1015 (D.C. Cir. 1971); Marine Space Enclosures, Inc. v. FMC, 420 F.2d 577, 585-86 n.22 (D.C. Cir. 1969).

[41] Upjohn Co. v. Finch, 422 F.2d 944, 955 (6th Cir. 1970).

[42] National Air Carrier Ass'n v. CAB, 436 F.2d 185, 191 (D.C. Cir. 1970).

[43] Claggett, *Informal Action—Adjudication—Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51, 78.

III

A Critique of the Ad Hoc Approach to Procedural Review

A. *Legal Infirmities*

The ad hoc approach contravenes recent, authoritative interpretations of the APA. These interpretations make clear that an agency does not "abuse its discretion" by declining to utilize procedures more formal than those set out in section 553.[44] In *United States v. Allegheny-Ludlum Steel Corp.*[45] and *United States v. Florida East Coast Ry.*,[46] courts examined Interstate Commerce Commission (ICC) regulations aimed at alleviating the nation's chronic freight car shortage. The Commission had formulated these regulations through section 553 procedures, taking only written submissions on its proposals before issuing final rulings. Noting that the Interstate Commerce Act itself requires a "hearing" prior to Commission action,[47] the petitioners in both cases claimed that more formal procedures should have been followed by the ICC. But in *Allegheny-Ludlum,* the Supreme Court held that the term "hearing" in the Interstate Commerce Act is insufficiently close to the APA's term "hearing on the record" to indicate any congressional desire to impose on the ICC the adjudicatory procedures of sections 556 and 557.[48] In *Florida East Coast Ry.,* the Court held that the ICC's receipt of written submissions adequately met the "hearing" provision of the Commerce Act.[49] The message of these cases is clear. Courts are not to impose on agencies the formalities of sections 556 and 557 unless Congress has unmistakably so provided, and courts are not to spin their own procedural requirements from statutory catch-phrases of uncertain meaning.

If the APA precludes the ad hoc approach, then that approach can survive only if the Constitution requires it. But there is not even a colorable claim to this effect. Of course, the due process clause often confers trial-like procedural rights on an individual who becomes the focus of a government action.[50] However, in the

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[44] *See* notes 45-49 and accompanying text *infra.*

[45] 406 U.S. 742 (1972).

[46] 410 U.S. 224 (1973).

[47] 49 U.S.C. § 1 (14)(a) (1970).

[48] 406 U.S. at 756-58; *see* 410 U.S. at 234-38.

[49] 410 U.S. at 238-46.

[50] *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963); *cf.* Greene v. McElroy, 360 U.S. 474 (1959).

rulemaking context, the constitutional touchstone remains Mr. Justice Holmes's opinion for a unanimous court in *Bi-Metallic Investment Co. v. State Board of Equalization*,[51] holding that a hearing was unnecessary before Colorado tax officials could substantially increase the valuation of all property in Denver. *Bi-Metallic* is nearly sixty years old, but just last term, the Supreme Court cited it with approval and reemphasized that the due process clause embodies the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other."[52] This need not mean that the due process clause has *no* application to rulemaking. Arguably, all government actions must be surrounded by procedures representing a reasonable balance between fairness and efficiency. For rulemaking, however, the fairness is owed to the public generally, not to particular individuals, and there is consequently no reason to doubt that the procedures of section 553 strike other than a reasonable balance.

B. *Infirmities of Logic and Policy*

Having no foundation in the Constitution or the APA, the ad hoc approach to procedural review of rulemaking should be rejected as a violation of statutory law. But two general arguments have been advanced in support of the ad hoc approach: (*1*) that it promotes "procedural inventiveness,"[53] and (*2*) that it somehow facilitates judicial review of the substance of administrative rules.[54] These arguments sound rather good as slogans, but they do not withstand close scrutiny.

1. *"Procedural Inventiveness"*

No one can deny that the ad hoc approach would allow courts to be "procedurally inventive." Judges could custom tailor procedural requirements to each distinct administrative action and could thus discontinue what Professor Claggett calls the "unprofitable exercise" of trying to "draw general and abstract lines separating areas especially appropriate for formal adjudication from those more appropriate for rulemaking."[55] But if judges now

[51] 239 U.S. 441 (1915).

[52] Florida East Coast Ry. v. United States, 410 U.S. 224, 244-46 (1973).

[53] Claggett, *supra* note 43, at 70.

[54] *See* text accompanying notes 71-72 *infra*.

[55] Claggett, *supra* note 43, at 68.

have trouble inscribing a clear line between "legislative" and "adjudicatory" actions,[56] how could they reach a consensus on the appropriate procedures to govern the thousands of actions issuing annually from the federal bureaucracy? On occasion, an agency may make a "rule" which applies to only one regulated party,[57] or it may adopt a new legal standard in an adjudication.[58] Such administrative perversions obviously raise problems of fairness with which the courts should deal.[59] But this is no reason to disregard section 553 when reviewing the vast majority of agency actions which are indisputably valid exercises of rulemaking power. If reviewing courts ignored the guidance of section 553 and instead operated under a vague injunction to find those procedures "best" suited to *each* agency action presented, judicial review of rulemaking would become totally unpredictable.

The administrative response would, however, be completely predictable. Fearing reversal of his substantive initiatives, each administrator would clothe his agency's actions in the full wardrobe of adjudicatory procedure. By demanding procedural refinements on an ad hoc basis, reviewing courts would inadvertently induce

[56] The problem is discussed in 1 K. DAVIS, *supra* note 6, § 5.01, at 285. *See also* American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.), *cert. denied,* 385 U.S. 843 (1966).

[57] The problem is mentioned in American Airlines, Inc. v. CAB, 359 F.2d 624, 631 (D.C. Cir.), *cert. denied,* 385 U.S. 843 (1966). It should be noted, however, that the APA's definition of a "rule" includes "an agency statement of . . . particular applicability." 5 U.S.C. § 551(4) (1970). Professor Davis reads the legislative history of the Act as suggesting that an agency action which applied expressly to only one or several named parties might nevertheless be a "rule." 1 K. DAVIS, *supra* note 6, at § 5.02. Such a rule might, however, have considerable trouble surviving an equal protection challenge or the constitutional prohibition against bills of attainder. *See* United States v. Brown, 381 U.S. 437 (1965).

[58] *See, e.g.,* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); SEC v. Chenery Corp., 332 U.S. 194 (1947); Bell Aerospace Co. v. NLRB, 475 F.2d 485 (2d Cir. 1973).

[59] The fairness problems may be simply articulated; they are not so prolix or multifaceted as to cast a shadow over the basic distinction between rules and adjudicatory orders. Consider first the making of new rules in an adjudication. The possible unfairness here is two-fold. If the rule is applied to the parties in the adjudication, the rule is retroactive; the parties have been denied fair notice of what the law expects of them. Even if the rule's application is only prospective, its formulation without the participation and comment of all interested parties constitutes a violation of the public's right to open and informed rulemaking. When a rule applies to only a single party, there are also several problems. Generally, discrimination between parties is fair only if (*1*) a rational theory underlies the distinction, and (2) the theory has been accurately applied to the behavior or empirical traits of the parties. A rule singling out one party for special treatment will often be invalid for lack of a rational and permissible basis for the discrimination, a problem which no amount of adjudicatory procedure will cure. The agency may, however, cite a rational underlying theory and claim that application of that theory to the world of possible regulated parties in fact selects out a single party. This is an empirical proposition which is so unlikely, and so dependent on detailed, fine grain factual determinations, that courts can justifiably demand that the agency subject the proposition to the test of traditional adjudicatory procedures.

agencies to adopt maximum procedures in all cases. Seeking administrative variety, we would obtain administrative paralysis. The inherent virtues of rulemaking—expedition, flexibility to experiment, a sensible balance between expertise and broad public participation—would be forfeited. Like adjudicatory regulation today, rulemaking would become a lawyer's game.

There is a clear need for procedural innovation in many new areas of administrative rulemaking.[60] But such innovation can only come, as the APA contemplates, from Congress or from the agencies themselves. To the extent that oral argument and cross-examination are genuinely useful in illuminating the empirical questions that course through some rulemaking, it is hardly utopian to rely on Congress and the agencies for a proper response. In the past decade, most of the major grants of rulemaking authority made by Congress have specified procedures that exceed in one way or another those required by section 553.[61] The excessive fondness of the agencies for adjudicatory methods is a matter of historical record.[62] Therefore, lawyer-like procedures in the rulemaking context simply do not need the services of an extra-statutory judicial crusade.

2. *Procedural Review vs. Substantive Review*

In this "new era"[63] of environmental, economic, and energy regulation, there would be great attraction to any approach which genuinely facilitated substantive review of agency rules. In the past year, this author has personally received a compulsory education in the intricacies of nuclear breeder reactor development,[64] the difficulties of pipeline construction through the Alaskan tundra,[65] the effect of different gasoline grades on auto engine performance,[66] the economics of air transport between small cities

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[60] *See generally* Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972); Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276 (1972).

[61] For a useful listing and analysis of recent rulemaking grants containing procedural guaranties beyond the requirements of § 553, see Hamilton, *supra* note 60, at 1315-30.

[62] *See* notes 6 & 14 *supra*.

[63] Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971).

[64] Scientific Institute for Pub. Information v. AEC, No. 1131 (D.C. Cir., June 12, 1973).

[65] Wilderness Soc'y v. Morton, 463 F.2d 1261 (D.C. Cir. 1972), *aff'd on rehearing en banc*, 479 F.2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

[66] National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

in New England,[67] and the differing methods of producing sulphuric acid.[68] This is a rather rich diet for a "generalist" decision-maker who feels more comfortable with a volume from West Publishing Company than with a computer print-out. Furthermore, these new rulemaking cases raise questions of the utmost political urgency. In the Alaskan pipeline litigation,[69] for instance, the environmental integrity of our largest state was pitted against the immediate economic needs of its citizens, against the huge investments of several oil companies, and against the acute energy and fuel requirements of the entire nation. In the auto emissions case, the court recognized it was dealing with perhaps "the biggest industrial judgment that has been made in the United States in this century."[70]

But how exactly do the difficulties of substantive review justify adopting the ad hoc approach to procedural review? Two suggestions have been advanced. Reasoning that agency use of adjudicatory procedure would guarantee the substantive adequacy of agency rules, Judge Bazelon has argued that the ad hoc approach could—and should—virtually replace substantive review.[71] He fears that in many of the new areas of rulemaking, the exercise of substantive review dangerously taxes the competence of courts, converting them into superagencies charged with second guessing the technological, scientific, and economic judgments of rulemakers. The other suggestion accepts the need for a wide ranging

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[67] Eastern Air Lines v. CAB, No. 72-1703 (D.C. Cir., Oct. 3, 1972) (unpublished).

[68] Essex Chem. Corp. v. Ruckelshaus, No. 72-1072 (D.C. Cir., Sept. 10, 1973).

[69] Wilderness Soc'y v. Morton, 463 F.2d 1261 (D.C. Cir. 1972), *aff'd on rehearing en banc*, 479 F.2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

[70] International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 633 (D.C. Cir. 1973), *quoting* remarks of Senator Baker during debate on the Clean Air Act of 1970. *See* 116 CONG. REC. 33,085 (1970) (remarks of Senator Baker).

[71] *Id.* at 650-53 (Bazelon, J., concurring); *cf.* Texas Gulf Coast Area Natural Gas Rate Cases, No. 71-1828 (D.C. Cir., Aug. 24, 1973). Writing for the majority in the *Texas Gulf Coast* case, Judge Bazelon stresses that an agency, in settling rates, must meet a statutory test of being "just and reasonable," and should "set forth with clarity the grounds for its rejection of opposing views and the reasons it has arrived at its results." *Id.* at 108-11. This author is in full sympathy with that position; indeed the "basis and purpose" requirement of the APA's § 553 should be read to demand no less. *See* text accompanying notes 20-22 *supra*. But there is a difference between asking an agency lucidly to justify its actions and requiring the agency to take action only through *adjudicatory procedures*. Judge Bazelon finds *both* requisites necessary to provide "a framework for principled decision-making." Texas Gulf Coast Natural Gas Rate Cases, *supra* at 109; International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651 (D.C. Cir. 1973). Judge Bazelon's "framework" fails, in my judgment, to take sufficient account of the distinction between the kinds of "principled decision-making" required for fairness to an individual, on the one hand, and fairness to the public generally on the other. *See* text accompanying notes 15-22 *supra*.

substantive review and argues that rulemakers must be forced to embrace adjudicatory procedures so that an adequate "record" will be developed for such review.[72]

To both of these suggestions, there is a threshold objection: each tries to facilitate substantive review at the cost of paralyzing agencies with procedures otherwise irrelevant to sound rulemaking. Surely the court's task can be rendered tolerable without rendering rulemaking a practical impossibility. Furthermore, both suggestions misconceive the role of substantive review. Since the APA not only disallows the ad hoc approach to procedural review,[73] but also requires substantive review, Judge Bazelon's proposal is doubly doubtful. It is also unnecessary. Substantive review under the APA does not convert the reviewing court into a superagency. The APA standard of review is singularly undemanding, and it allows adequate play to Judge Bazelon's perception that courts can often better assess the way rules are made than the merits of the rules themselves. By the same token, courts do not need an adjudicatory record to undertake the necessary task of substantive review. Rather, they can and should review the legally sanctioned record of rulemaking which must be generated as a matter of course by section 553 procedures.

a. *The APA Requires Substantive Review.* Under section 706 of the APA, the reviewing court must strike down not only those agency rules which are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," but also those actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[74] Presumably, the first standard means that an agency rule must conform to the agency's delegated power, just as a statute must conform to the Constitution. However, unless the Act's drafters committed a redundancy, the "arbitrary, capricious" standard goes beyond this. It applies to the factfinding, fact-predicting, and factual reasoning processes which led the agency to adopt the rule. As Judge MacKinnon has pointed out, a contrary interpretation would reduce review under the "arbitrary, capricious" standard to "a relatively futile exercise in formalism," because a "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."[75] This is the precise teaching of the

[72] *See, e.g.*, Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1259-60 (D.C. Cir. 1973). Compare Superior Oil Co. v. FPC, 322 F.2d 601, 619 (9th Cir. 1963), *cert. denied*, 377 U.S. 922 (1964).

[73] *See* notes 44-52 and accompanying text *supra*.

[74] 5 U.S.C. §§ 706(2)(C), (A) (1970).

[75] Chicago v. FPC, 458 F.2d 731, 742 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

Supreme Court's important decision in *Overton Park v. Volpe.*[76] There, the Secretary of Transportation had approved construction of an interstate highway through a public park, even though applicable legislation allowed such approval only if no "feasible and prudent" alternative route existed. Although the Secretary's action was not a "rule" in the APA sense,[77] the Court nevertheless applied the "arbitrary, capricious" standard of section 706 and ordered a "searching and careful" review by the district judge of all the facts, studies, and expert views which had provided the basis for the Secretary's action. The purpose of review was to determine "whether the decision was based on a consideration of the relevant factors."[78] After *Overton Park,* it is highly doubtful that courts can simply avoid substantive review of rulemaking, no matter how many "procedures" are imposed on the rulemaking agency.

b. *The Standard of Review Is Undemanding.* While the converse of arbitrariness and caprice is rationality, the APA authorizes a reviewing court to demand of rulemakers only the most basic, minimal sort of rationality. A judge cannot strike down a rule merely because it seems to him "unreasonable," in the sense of being unwise or wrong, any more than he could upset congressional legislation for that reason.[79] Rather, the APA has been interpreted by the Supreme Court to require only that "th[e] inquiry into the facts . . . be searching and careful, [and] the ultimate standard of review [be] a narrow one. The court is not empowered to substitute its judgment for that of the agency."[80] The reviewing court is not even authorized to examine whether a rulemaker's empirical conclusions have support in substantial evidence. The APA reserves the substantial evidence test for review of adjudications and of rules which must be made after a "hearing on the record."[81] This exemption of conventional rulemaking from the substantial evidence test is very important, because that test is not itself terribly demanding. Exercising review under it, a court cannot disturb a factfinder's weightings of conflicting evidence merely because these seem "clearly erroneous"; only those determinations which are patently unreasonable can be upset.[82] Finding

[76] 401 U.S. 402 (1971).

[77] *Id.* at 414.

[78] *Id.* at 416.

[79] *See* 1 K. DAVIS, *supra* note 6, § 5.03, at 299.

[80] Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

[81] 5 U.S.C. § 706(2)(E) (1970).

[82] Appellate courts use the "clearly erroneous" test in reviewing the factual determinations of a trial judge, sitting without a jury, but the less demanding test of "substantial evidence" is used in reviewing a jury's findings or in determining whether to direct a verdict

words to formulate a standard of review which is less demanding than substantial evidence is no easy task.[83] It must be conceded that the cases applying the "arbitrary, capricious" test have not approached this problem with great vigor.[84] Simple logic, however, suggests a rough answer. If weightings on conflicting evidence need be only "reasonable" to pass the substantial evidence test, it follows that they can be less than reasonable and still survive the "arbitrary, capricious" test. If this is so, the latter standard subjects a rulemaker to only the most rudimentary command of rationality. In drawing empirical conclusions, he must give actual, good faith consideration to all relevant evidentiary factors. If he has in fact given serious attention to a factor, the weight which he assigns to it in his final judgments is of virtually no concern to the reviewing court.

This is not quite so radical as it sounds. Final empirical conclusions never flow directly or mechanically from the weights assigned to raw items of evidence. In between, there are typically several steps of inferential reasoning and, even under the "arbitrary, capricious" test, these presumably must be something more than exercises in whimsy or free association. Nevertheless, the "arbitrary, capricious" standard seems to require not an evaluation of the rulemaker's empirical conclusions, but rather an inquiry into the basic orderliness of the process by which evidence and alternative rulings were considered. Thus, *Overton Park* requires that agency action be "based on a consideration of the relevant

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in a jury case. For a cogent discussion of this familiar distinction, see 4 K. DAVIS, *supra* note 6, § 29.02, at 118-22.

[83] Indeed, Professor Davis thinks the task an impossible one. *Id.* § 29.07, at 149. He believes that the "substantial evidence" test itself is made of "rubber" rather than "wood" and is therefore capable of supporting de facto standards of review with widely differing degrees of rigor. *Id.* § 29.02, at 126. This view is not necessarily inconsistent with the suggestions in the text. In speaking of the "reasonableness" or "rationality" of an agency's empirical determinations, we may obviously mean many different things. While these differing meanings may constitute a continuous spectrum which cannot be neatly broken into discrete segments, it may nevertheless be possible to give a rough characterization of that end of the spectrum represented by the "arbitrary, capricious" standard of review.

[84] For example, the court in Chicago v. FPC, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972), contented itself with pointing out that the "arbitrary, capricious" test and the "substantial evidence" test both derive from the "general principle" that "the object of review is to determine whether a reasoned conclusion from the record as a whole could support the premise on which the Commission's action rests." In Overton Park v. Volpe, 401 U.S. 402, 416 (1971), the Court actually suggested that the "arbitrary, capricious" test authorizes a reviewing judge to upset "a clear error of judgment" by the agency. Such language contains inappropriate echoes of the "clearly erroneous" standard of review and is inconsistent with *Overton Park*'s own admonition that a reviewing court "is not empowered to substitute its judgment for that of the agency." *Id.*

factors,"[85] and a later case mandates that rulemakers conduct "a considered evaluation of the presently available alternatives."[86] These phrases mark out a realistic approach to substantive review. The empirical judgments at stake in rulemaking necessarily rest on prediction, for a rule has prospective application only, and agency rules typically involve issues of great technical complexity. Reviewing judges can make a valuable contribution to the rationality of rulemaking by asking questions such as: "Did you take this factor into account?" "What about this possibility?" But once the court is satisfied that the administrator did touch all the bases, absent obvious irrationality, there is little more a court can accomplish. Judges lack the special skills to evaluate sensibly the weightings assigned to technically abstruse evidence; only future historians can assess the merits of a rulemaker's predictions.

This analysis of substantive review undermines Judge Bazelon's proposal that substantive review be replaced by the ad hoc approach to procedural review. Substantive review, properly understood, is too modest an enterprise to convert courts into superagencies, and the standard of substantive review itself incorporates Judge Bazelon's underlying, and correct, perception that courts can more competently assess the rationality of the rulemaking process than the merits of the resultant rules. The problem with the ad hoc approach to procedural review is that it goes well beyond this sound perception. The ad hoc approach mandates that the courts prescribe precise and formal methods for bureaucratic policymaking. This mandate assumes an expertise in administrative science which duty on the bench simply does not confer. By contrast, the "arbitrary, capricious" standard of substantive review authorizes courts merely to scrutinize the actual making of a rule for signs of blind prejudice or of inattention to crucial evidence—a task of straightforward detective work which is well within the capacities of generalist judges.

Replacing substantive review with the ad hoc approach to procedural review would make sense only if adjudicatory formalities constituted both a necessary and a sufficient condition for the rulemaking process to be rational. Neither branch of this proposition is sound. Rulemaking is adequately rational, under the APA, so long as the administrator is presented with all relevant evidentiary factors, gives serious consideration to those factors, and

[85] Overton Park v. Volpe, 401 U.S. 402, 416 (1971).
[86] Pillai v. CAB, No. 73-1408 (D.C. Cir., Aug. 22, 1973) 3.

uses reason rather than whim to progress from initial assumptions to final conclusions. Let us take these requisites in turn.

For purposes of presenting evidence, formalized adjudicatory methods are clearly inessential: The three-step procedure of section 553[87] is expressly designed to provide the administrator access to all data, criticisms, suggestions, alternatives, and contingencies relevant to his decisions. Adjudicatory methods are in fact insufficient to this task. A rulemaker must typically make and coordinate many empirical conclusions dependent on raw material outside the conventional evidentiary categories of "testimony" and "exhibits." For example, the rulemaker must often draw upon prior experience, expert advice, the developing technical literature, ongoing experiments, or seasoned predictions.

As for the consideration given to these factors, a rulemaker can surely demonstrate his seriousness and good faith without allowing interested parties to cross-examine him or quarrel orally before him. He can, for instance, through the "basis and purpose" statement,[88] detail for the court the actual attention he gave to the factors, and explain his final disposition with respect to each of them. It would indeed be insufficient for him to listen passively to the contentions of the best financed and most skillfully represented formal "parties." An agency is not a judge or a sequestered juror. It cannot "act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."[89] Further, an administrator's attendance at an adjudicatory hearing does not guarantee that he has given good faith attention to all the disparate factors bearing relevantly on his decisions. Indeed, mere attendance does not even ensure attention to factors raised in the hearing itself.

Finally, *no* form of procedure can ensure the minimal rationality of a rulemaker's inferences. These after all occur within his head! To see whether he has kept the counsel of reason, the reviewing court must in each instance demand an orderly explanation of the rulemaker's inferences. For such an explanation, logic suggests no procedural substitute.

c. *Substantive Review Operates on an "Administrative" Record.*

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[87] *See* notes 16-22 and accompanying text *supra.*

[88] *See* text accompanying notes 20-22 *supra.*

[89] Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966); *cf.* Office of Communications of the United Church of Christ v. FCC, 425 F.2d 543, 546 (D.C. Cir. 1969).

That rulemakers should use adjudicatory procedures merely to provide courts with a "record" of those procedures is an argument which may charitably be termed circular. If courts adopt this curious theory, their partnership with the agencies will be transformed into a quaint minuet. Substantive review is an inquiry into the realities of the rulemaking process, not an occasion for pretending that agencies are some species of lower court.[90] Consequently, a proper record must reflect all of the relevant views and evidence considered by the rulemaker, from whatever source, and—like a mini-history—it must reveal if and how the rulemaker considered each factor throughout the process of policy formation. Such is the "full administrative record" adverted to in *Overton Park* and its progeny.[91] To provide such a record is one of the functions of the three-step procedure in section 553. If that provision receives the broad interpretation and strict enforcement which it merits,[92] the reviewing court will be provided the following record:

Step one of section 553 will yield the agency's initial proposal, its tentative empirical findings, important advice received from experts, and a description of the critical experimental and methodological techniques on which the agency intends to rely. Step two will produce the written or oral replies of interested parties to the agency's proposals and to all the other "step one" materials. And step three will furnish the final rule, accompanied by a statement both justifying the rule and explaining its normative and empirical predicates through reference to those parts of the record developed in steps one and two.

Section 553 thus opens a broad window on the rulemaking process, surely broad enough to reveal any unfairness to the public committed by the rulemaker. At the same time, the window is not so large as to invite a judicial breaking and entering. By generating a unique sort of "record," the APA's procedures simultaneously facilitate and carefully channel the exercise of substantive review. Upsetting those procedures would almost certainly disturb the appropriate balance between skepticism and deference in substantive review itself.

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[90] The Supreme Court has said that:

> [T]o assimilate the relationship of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process.

FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 144 (1940).

[91] Overton Park v. Volpe, 401 U.S. 402, 420 (1971). *See also* Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 336-37 (D.C. Cir. 1968).

[92] *See* text accompanying notes 17-22 *supra*.

IV

THE MECHANICS OF RESTRAINT

When based on a proper administrative record, the mechanics of review are quite straightforward. If the subject matter of a rule falls within an agency's delegated authority, there are only two grounds for a court upsetting it. First, the "basis and purpose" statement given by the agency may include no reasons, or merely conclusory reasons, for adopting the rule or for rejecting evidence, criticisms, or alternatives submitted by outsiders. In this instance, the agency has violated the third procedural step of section 553 and simultaneously has violated the "substantive" standard of review by failing to show good faith consideration to all relevant factors. No matter how the agency's default is labelled, the remedy is of course to remand the rule. But such remand is only to allow the agency, through fuller explanation, to show that the rulemaking process was actually animated by reason rather than blind instinct.[93] Since the "basis and purpose" statement is part of the "record," as well as a "procedure," this is in essence a remand "for a fuller record." But there should be no suggestion that the agency need take more submissions from outsiders, and certainly no suggestion that adjudicatory procedures are required.[94]

Second, remand will be proper when the agency has relied on important findings, assumptions, or techniques not made public prior to the rule's promulgation. In this instance, the agency has violated step one of the section 553 procedures. Since the unfairness here is to the public and not to an individual "party," the remedy is to instruct the agency to return to step one, *not* to order a legally impermissible adjudicatory consideration of issues theretofor unrevealed by the agency.

Compared to this simple routine, the ad hoc approach to procedural review assigns to the judiciary a relentlessly "activist" role. In some other areas of law, this author has not found such a

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[93] Courts often remand agency actions with the understanding that the action need not be changed so long as the agency can supply a satisfactory legal justification for the action. *See, e.g.,* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 249-50 (1972); SEC v. Chenery Corp., 332 U.S. 194 (1947); Essex Chem. Corp. v. Ruckelshaus, No. 72-1072 (D.C. Cir., Sept. 10, 1973) 23 n.40.

[94] Of course, the basis supplied for an action must not be simply a post-hoc rationalization for action that was essentially arbitrary when taken. *See, e.g.,* Burlington Truck Lines v. United States, 371 U.S. 156 (1962). And it cannot be based on evidence or methods of which the regulated public received no prior notice. *See* text accompanying notes 17-19 *supra.*

role uncongenial.[95] But the ad hoc approach to administrative review lacks those foundations in law and reason which an activist posture requires. The approach has no statutory underpinnings; indeed, it flies in the face of the APA. It can claim no constitutional mandate, and it certainly protects no minority interests which the political system would otherwise ignore. Furthermore, the approach draws on no talents peculiar to the judiciary. Although we judges may have a professional attachment to cross-examination and oral argument, we have no special expertise in the procedure appropriate to bureaucratic policymaking.

What reviewing courts can realistically do to improve rulemaking is just what the APA asks them to do—open the agencies to outside information, challenge, and scrutiny. Before dismissing this as a demeaning or trivial task, we should recall how many agencies have become captives of private interests, closed to new methods or regulation and planning, and dedicated to obscuring their policies from the public and Congress. In sections 553 and 706, the APA provides the courts with powerful tools to attack these abuses. We should learn to use these tools and give up playing arcane procedural games authorized by neither statute nor common sense.

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[95] *See* Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court,* 84 HARV. L. REV. 769 (1971); Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint,* 54 CORNELL L. REV. 1 (1968).